

FEDERAL CIRCUIT COURT OF AUSTRALIA

CHEN & ORS v MINISTER FOR IMMIGRATION

[2015] FCCA 1018

Catchwords:

MIGRATION – Business and Investment (Provisional) (Subclass 188) visa – procedural fairness – no jurisdictional error.

Legislation:

Migration Act 1958 s.476

Migration Regulations 1994 Schedule 4, Public Interest Criterion 4020

First Applicant:	YUMEI CHEN
Second Applicant:	QUIONGXIN ZHANG
Third Applicant:	HANMING CHEN
Fourth Applicant:	CHENG ZHANG
Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
File Number:	SYG 2835 of 2014
Judgment of:	Judge Street
Hearing date:	22 April 2015
Date of Last Submission:	22 April 2015
Delivered at:	Sydney
Delivered on:	22 April 2015

REPRESENTATION

No appearance by the Applicant

Counsel for the Respondent: Mr D. Hughes

Solicitors for the Respondent: DLA Piper

ORDERS

- (1) The amended application be dismissed.
- (2) The First, Second and Third named Applicants pay the Respondents costs fixed in the sum of \$6646.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA**

AT SYDNEY

SYG 2835 of 2014

YUMEI CHEN

First Applicant

QUIONGXIN ZHANG

Second Applicant

HANMING CHEN

Third Applicant

CHENG ZHANG

Fourth Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

Respondent

REASONS FOR JUDGMENT

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* for a Constitutional writ in respect of a decision of the delegate made on 10 September 2014 refusing the applicant's application for a Business and Investment (Provisional) (Subclass 188) visa.

2. The amended application identifies the following grounds:

1. In finding that a Tax Certificate issued on 19 September 2013 by the Zhejiang Province Pingyang Country National Tax Bureau

was a “bogus document” within the meaning of s 97 of the Act, the delegate failed to make any finding that there had been an element of fraud or deception accompanying the provision of that document to the respondent, thereby failing to establish that Public Interest Criterion 4020 in Schedule 4 to the Migration Regulations 1994 had been engaged.

2. The delegate failed to deal with evidence that was capable of verifying the genuineness of the Tax Certificate; namely, that the figure of RMB972636.7 for export offset in the document provided by the first applicant accorded with the records kept by the Tax Bureau.

3. The matter was listed for hearing today at 10.15am. The matter has been called outside the Court. I am satisfied that the applicants were notified of the hearing date.
4. In relation to the first ground, it is clear that the Delegate made a finding that the tax certificate was a bogus document and relevantly that it was purposely untrue. It is not necessary for the delegate to find that the document was the subject of a fraud or deception by the applicant. There is no jurisdictional error of the kind identified in ground 1.
5. In relation to ground 2, this appears to be an impermissible challenge to a finding of fact. It is clear from the Court book that there was information provided in relation to the bogus document and in particular the company tax paid for 2012 in a particular amount which was clearly identified in the letter dated 15 August 2014 sent by the delegate to the applicant and, relevantly, on page 314. It is clear, in those circumstances, that the delegate had regard to the communications concerning the tax certificate. It is not the position that the information referred to was capable of verifying the genuineness of the tax certificate finding of fact by the delegate that it was a bogus document was open.

6. The delegate’s reasons identify:

As an integrity measure, the Tax Certificate was referred to the issuing authority for verification. According to the officer at the relevant tax bureau, the amounts of VAT and EIT paid were inconsistent with the tax bureau’s record. In particular, we were advised that the Company did not pay any VAT and only paid EIT

of RMB1,248,997.04 for the year. As such, it appears that you have provided a bogus document in your visa application.

You were advised via electronic mail on 15/8/2014 that each applicant for a Class EB Subclass 188 Business Innovation and Investment (Provisional) visa is required to satisfy the requirements of PIC 4020, and as evidence has been found in your application that suggest a bogus document or information that is false or misleading in a material particular has been submitted, it would suggest that PIC 4020 has not been met. You were provided with 28 days to comment on the suspected fraudulent information and to present any compelling or compassionate circumstances that may exist to warrant the waiving of PIC 4020 (1).

Your response in relation to the non-genuine findings of the verification check was received in our office on 28/8/2014.

7. It was in those circumstances the delegate made findings as follows:

A decision maker must accord due weight to the finding of a verification check. On the basis of the information and evidence before me, I find that:

(1) the document verification was conducted in a clear and direct manner and the outcome was unequivocal. When a verification check was conducted with Zhejiang Province Pingyang County National Tax Bureau, an officer personally confirmed that the amounts of VAT and EIT paid by the Company in year 2012 were inconsistent with the tax bureau's record;

(2) in response to the letter inviting you to comment, you submitted the original Tax Certificate but the stamp was different from the certified copy. The evidence failed to refute the non-genuine finding;

(3) the tax payment receipts were incomplete and are therefore not give significant weights as evidence; and

(4) apart from the tax payment receipts and certificates, there were no other independently verifiable documents such as bank transaction records submitted to prove the tax payment of the Company.

On the basis of the above, I am unable to find the subsequently provided documentation strong enough to refute the earlier non-genuine finding of the Tax Certificate. As such, I find that there is evidence that you have given, or caused to be given, a bogus

document in relation to the application for visa. As such, I am not satisfied that you meet PIC 4020(1).

As you have not provided any evidence to support that there are compassionate or compelling circumstances which exist to warrant the waiving of PIC 4020(1), I am not satisfied that PIC 4020 is met.

On the basis of the information provided, I find that you do not meet the criteria for the grant of a Business Skills (Provisional) (class EB) Business Innovation and Investment (Provisional) (subclass 188) visa. As I have found that you do not satisfy clause 188.213, it is not necessary for me to consider the other criteria for this subclass of visa.

8. It was in those circumstances that the delegate found that the primary applicant did not meet clause 188.213 and did not meet the criteria for the grant of the Business Skills (Provisional) (Class EB) Business Innovation and Investment (Provisional) (Subclass 188) visa and refused the application for Business Skills (Provisional) (Class EB) Business Innovation and Investment (Provisional) (Subclass 188) visa.
9. The delegate identified in relation to the second applicants, having assessed the ability to meet the primary criteria, and found that the second applicants did not meet the criteria for the grant of a Business Skills (Provisional) (Class EB) Business Innovation and Investment (Provisional) (Subclass 188) visa. It was in those circumstances that the second applicants failed to meet clause 188.311 and their applications for the grant of the Business Skills (Provisional) (Class EB) Business Innovation and Investment (Provisional) (Subclass 188) visa was also refused.
10. There was no jurisdictional error by the delegate and the findings made were open. The amended application is dismissed

I certify that the preceding 10Error! Style not defined.Error! Style not defined.ten (10) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 23 April 2015